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United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

| | | |
|---------------------------|---|--------------------------------|
| UNITED STATES OF AMERICA, |) | Criminal Case No. 08CR0369-JLS |
| |) | |
| Plaintiff, |) | Date: March 21, 2008 |
| |) | Time: 1:30 p.m. |
| v. |) | |
| |) | GOVERNMENT'S RESPONSE AND |
| CHEONG SAU WONG(1), |) | OPPOSITION TO DEFENDANTS' |
| XU JUN LEE(2), |) | MOTIONS TO: |
| |) | |
| |) | (1) COMPEL DISCOVERY; |
| Defendants. |) | (2) DISMISS DUE TO GRAND JURY |
| |) | INSTRUCTION; AND |
| |) | (3) FILE FURTHER MOTIONS. |
| |) | |
| |) | TOGETHER WITH STATEMENT OF |
| |) | FACTS, MEMORANDUM OF POINTS |
| |) | AND AUTHORITIES. |
| |) | |

COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and through its counsel KAREN P. HEWITT, United States Attorney, and A. DALE BLANKENSHIP, Assistant U.S. Attorney, and hereby files its Response and Opposition to the motions filed on behalf of defendants Cheong Sau Wong(1) and Xu Jun Lee(2) which is based upon the files and records of this case.

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I**STATEMENT OF THE CASE**

On February 13, 2008, a federal grand jury for the Southern District of California returned a five-count Indictment, charging Defendants, Cheong Sau Wong(1) and Xu Jun Lee(2) with transportation of illegal aliens and aiding and abetting in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II). Both Defendants were arraigned on the Indictment on February 14, 2008, and entered a not guilty plea.

On February 25, 2008, Defendant(2), Xu Jun Lee, filed motions to compel discovery; and leave to file further motions. On March 7, 2008, Defendant(1), Cheong Sau Wong, filed motions to compel discovery, dismiss the indictment due to misinstruction of the grand jury and leave to file further motions. On March 10, 2008, Defendant(2) filed a motion to join the motion to dismiss the indictment due to misinstruction of the grand jury filed by Defendant(1).

II**STATEMENT OF FACTS****A. IMMIGRATION HISTORY**

Defendant(1) is a United States citizen.

Defendant(2) is a citizen of China and a legal permanent resident of the United States.

B. CRIMINAL AND ARREST HISTORY

Defendant(2) has several arrests involving prostitution.

C. ALIEN-SMUGGLING

On January 29, 2008, at approximately 4:30 p.m., Bureau of Land Management ("BLM") Law Enforcement Rangers Cox, Nieblas and Kent, were on patrol on BLM lands, on County Road S-2, near the San Diego and Imperial County line. The rangers observed two vehicles traveling in tandem driving north on S-2. The vehicles were traveling very closely together at a high rate of speed for the road conditions. County Road S-2 has many elevation changes, curves, and blind spots. The front vehicle was a white 2004 GMC cargo van with California license plate #7H22487, the rear vehicle was a 20087 Mercury Mountaineer SUV with California license plate #6CEK721.

1 1. SUV Traffic Stop

2 Ranger Kent left his stationary position in his marked BLM law enforcement vehicle, and
3 Rangers Cox and Nieblas left there stationary position in their BLM law enforcement vehicle, and
4 began following the SUV and van. Due to the vehicles' high rate of speed, the rangers traveled
5 several miles before catching up with the vehicles. When Ranger Kent was able to catch up to the
6 vehicles, he observed the SUV pass the van on a blind curve. Ranger Kent observed the SUV
7 cross the solid double yellow lines, overtake the van and continue driving. When conditions were
8 safe, Ranger Kent passed the van, and as he approached the SUV, it pulled to the side of the road,
9 onto the shoulder, before Ranger Kent activated his emergency lights and sirens.

10 Ranger Kent pulled in behind the SUV, activated his emergency lights, and requested a
11 records check on the license plate. The dispatcher informed Ranger Kent that the vehicle was a
12 rental vehicle. Ranger Kent and approached the vehicle on the driver's side and asked the driver,
13 and sole occupant of the vehicle, Xu Jun Lee (Defendant(2)), for his driver's license and insurance
14 information. Defendant(2) provided his California driver's license and a rental contract from
15 Budget Rental Cars in Yuma, Arizona. Ranger Kent asked Defendant where he was coming from
16 and Defendant(2) replied that he was coming from Yuma, Arizona. Ranger Kent asked
17 Defendant(2) where he was going, and he replied that he was going to Julian, to visit his uncle.
18 Ranger Kent asked if he knows where his uncle lives in Julian, and Defendant(2) responded that
19 he does not know. When asked if he lives in Yuma, Defendant(2) responded that he lives in San
20 Jose.

21 Ranger Kent returned to his service vehicle to inform dispatch of his status. When Ranger
22 Kent returned to the vehicle, he asked Defendant(2) if he knew the person driving the van.
23 Defendant(2) responded that it was his uncle. Ranger Kent again asked Defendant(2) why he was
24 going to Julian, and Defendant(2) responded that he was helping his Uncle move from Yuma to
25 Julian. Ranger Kent asked Defendant(2) why he passed his uncle in such a dangerous way, and
26 Defendant(2) responded that his uncle was driving to slowly. Ranger Kent observed that
27 Defendant(2) had trembling hands, and appeared to be nervous while answering questions. Ranger
28 Kent also observed a camouflage two-way radio on the floor of the passenger floorboard and a cell

1 phone under the passenger seat. Ranger Kent then escorted Defendant(2) from the location where
2 Defendant(2) pulled over, to the location of the white van which had been pulled over by Rangers
3 Nieblas and Cox.

4 Upon arriving at the location of the white van, Ranger Kent observed that Rangers Nieblas
5 and Cox were removing persons from the white van. Ranger Kent also observed that individuals
6 were inside a wooden box in the back of the van. Ranger Kent conducted a pat down of
7 Defendant(2) for officer safety and handcuffed Defendant(2). During the patdown, Ranger Kent
8 discovered a large bundle of one hundred dollar bills in front pants pocket of Defendant(2).
9 Ranger Kent discovered several bundles of U.S. currency in a bag on the front passenger seat of
10 the SUV. The total amount of currency found on the person of Defendant(2) was \$1,200.00. The
11 total amount of currency in the bag was \$11,300.00. Ranger Kent asked Defendant(2) who owned
12 the money and Defendant(2) replied that some was his and some was not. Ranger Kent issued a
13 state citation to Defendant(2) for false statement, unsafe passing and crossing the double yellow
14 lines.

15 2. Cargo Van Traffic Stop

16 Law Enforcement Rangers Nieblas and Cox left their stationary position in a marked BLM
17 law enforcement vehicle and began following the SUV and van. Upon reaching the position of the
18 cargo van, Ranger Nieblas observed the SUV pass the van. After the SUV passed the cargo van,
19 Ranger Nieblas observed that the cargo van was swerving toward the fog line. Ranger Nieblas
20 initiated a traffic stop by activating his emergency lights and siren. Ranger Nieblas approached
21 the vehicle on the passenger side, and Ranger Cox approached on the driver's side. Ranger
22 Nieblas ordered Defendant(1), CHEONG SAU WONG, to turn off the vehicle. Ranger Nieblas
23 observed that the entire passenger area of the van was filled with furniture and a computer. Ranger
24 Nieblas also observed that Defendant(1) appeared to be nervous, his whole body was shaking and
25 his arms were flinging all over the steering wheel.

26 Ranger Nieblas asked Defendant(1) if there were any other occupants in the vehicle, and
27 Defendant(1) responded that there were not. Ranger Nieblas asked what was in the back of the van
28 and Defendant(1) responded that he had a computer in the back. Ranger Nieblas asked

1 Defendant(1) for permission to search the vehicle and Defendant(1) consented. Ranger Nieblas
2 also asked Defendant(1) if he was traveling with the SUV and he replied that he was not. Ranger
3 Nieblas communicated with Ranger Kent and was informed of the statement by Defendant(2) that
4 he was traveling with Defendant(1).

5 While searching the back of the cargo van, Ranger Nieblas heard movement in the back of
6 the vehicle. While Ranger Cox continued to search the vehicle, Ranger Nieblas again asked
7 Defendant(1) if there were people inside the van and he replied no. Ranger Nieblas asked
8 Defendant(1) where he lives Defendant(1) replied that he lives in Yuma. Defendant(1) further
9 stated that he was coming from Yuma and that he was going to Julian. Defendant(1) denied
10 knowing the driver of the SUV.

11 During the vehicle search, the Rangers found a wooden box. Ranger shined a flashlight
12 through the crack in the box and determined that people were hidden inside the box, but they could
13 not exit the box because a sofa was resting on top of the box, and the rear of the box was blocked
14 by two washers secured tightly by the rear doors. The sofa was removed and Ranger Cox broke
15 open the wooden box. Ranger Nieblas observed 4 males and one female cramped inside the box.
16 All were barefoot, soaked in sweat, and flushed. The female appeared to be unconscious, and it
17 took several loud orders to get her to respond. There was no food or water inside the box.

18 Ranger Nieblas found a receipt for the purchase of the vehicle for \$10,000.00 cash inside
19 the passenger door panel. Ranger Cox found a camouflage two-way radio matching the radio in
20 the SUV, and two cell phones in the drivers area of the cargo van. Rangers also found Chinese and
21 Korean currency in the vehicle. Ranger Nieblas cited Defendant(1) for providing false
22 information, people riding in the vehicle where not designated, and no proof of insurance.

23 Ranger Nieblas contacted United States Border Patrol and Border Patrol Agent Eduardo
24 Vasquez and Samuel Morales responded to the scene. Border Patrol Agents then transported the
25 Defendants and the material witnesses to the El Centro Border Patrol Station for processing.

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1 **D. DEFENDANT'S STATEMENT**

2 Immigration and Customs Enforcement ("ICE") Agents Paul Lewenthal and Chris Miller
3 responded to the El Centro Border Patrol Station to assist. The ICE agents advised each Defendant
4 of his Miranda rights and each Defendant invoked.

5 **E. MATERIAL WITNESS'S STATEMENT**

6 The ICE agents conducted interviews with each of the material witnesses utilizing the
7 services of Customs and Border Protection language line translator.

8 Material Witness Ligin Lin stated that he is a citizen of China and that he had no
9 immigration documents that would allow him to enter the United States. Lin stated that he traveled
10 from China to the United States by way of bus then boat. Lin stated that he believes that he has
11 been in the United States for approximately 2 months. Lin stated that a friend of his made
12 arrangements for his passage and that he did not know the amount that was to be paid. Lin stated
13 that he did not know where he was traveling in the United States. Lin also stated that he was inside
14 the compartment for approximately 2 hours and that he was not aware of who put him there.

15 Material Witness Liangeng Jiang stated that he is a citizen of China and that he too did not
16 have immigration documents. Jiang stated that he left China approximately 2 months ago and
17 traveled to an unknown place. Jiang stated that his uncle made his travel arrangements and that
18 he did not know how much was to be paid. Jiang also stated that he was inside the compartment
19 for 2 to 3 hours and that he could barely breathe, that there was nothing to drink, that he could not
20 move, and that he felt hot and sweaty.

21 Material Witness Yuhai Wang stated that he also is a citizen of China with no documents
22 to enter the United States. Wang stated that he left China approximately one year ago and traveled
23 to unknown countries. Wang stated that a friend of his made arrangements for his passage and that
24 he did not know the amount that was to be paid. Wang also stated that he was inside the
25 compartment for approximately 1 hour, that he could not breathe, that he could not move, and that
26 he could not get out of the compartment.

27 Material Witness Xuzai Dong, stated that he also is a citizen of China with no documents
28 to enter the United States. Dong stated that he left China approximately 6 months ago and traveled

1 to unknown countries by plane. Dong stated that he did not know where he was going in the
 2 United States. Dong also stated that he could not move inside the compartment, that he felt hot,
 3 that he could not breathe.

4 Material Witness Ming Zhou Zhu stated that she also is a citizen of China with no
 5 documents to enter the United States. Zhu stated that he left China in October of 2007 and traveled
 6 to unknown countries by plane, train and bus. Zhu stated that a friend of hers made arrangements
 7 for her passage and that she did not know the amount that was to be charged. Zhu also stated that
 8 she could not breathe, that she could not move, and that she could not get out of the compartment.

9 III

10 **UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES**

11 **A. THE GOVERNMENT WILL COMPLY WITH DISCOVERY OBLIGATIONS**

12 The Government intends to fully comply with its discovery obligations under Brady v.
 13 Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), and Rule 16 of the Federal
 14 Rules of Criminal Procedure. The Government anticipates that most discovery issues can be
 15 resolved amicably and informally, and has addressed Defendant's specific requests below.

16 **(1) The Defendants' Statements**

17 The Government recognizes its obligation under Rules 16(a)(1)(A) and 16(a)(1)(B) to
 18 provide to Defendant the substance of Defendant's oral statements and Defendant's written
 19 statements. The Government has produced all of Defendants' written statements that are known
 20 to the undersigned Assistant U.S. Attorney at this date and has also produced all available
 21 videotapes and/or audiotapes. If the Government discovers additional oral or written statements
 22 that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be
 23 provided to Defendant.

24 The Government has no objection to the preservation of the handwritten notes taken by any
 25 of the Government's agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th
 26 Cir. 1976) (agents must preserve their original notes of interviews of an accused or prospective
 27 government witnesses). However, the Government objects to providing Defendant with a copy
 28 of any rough notes at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes

where the content of those notes have been accurately reflected in a type-written report. See United States v. Brown, 303 F.3d 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in the notes was available in other forms). The notes are not Brady material because the notes do not present any material exculpatory information, or any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Defendant.

(2) Arrest Reports, Notes and Dispatch Tapes

The United States has provided the Defendant with arrest reports. As noted previously, agent rough notes, if any exist, will be preserved, but they will not be produced as part of Rule 16 discovery.

(3) Brady Material

Again, the United States is well aware of and will continue to perform its duty under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment. Defendant, however, is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused, or which pertains to the credibility of the United States' case. As stated

1 in United States v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that “the prosecution
2 does not have a constitutional duty to disclose every bit of information that might affect the jury’s
3 decision; it need only disclose information favorable to the defense that meets the appropriate
4 standard of materiality.” Id. at 774-775 (citation omitted).

5 The United States will turn over evidence within its possession which could be used to
6 properly impeach a witness who has been called to testify.

7 Although the United States will provide conviction records, if any, which could be used
8 to impeach a witness, the United States is under no obligation to turn over the criminal records of
9 all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such
10 information, disclosure need only extend to witnesses the United States intends to call in its case-
11 in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini,
12 607 F.2d 1305, 1309 (9th Cir. 1979).

13 Finally, the United States will continue to comply with its obligations pursuant to
14 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

15 (4) **Sentencing Information**

16 Defendant claims that the United States must disclose any information affecting
17 Defendant’s sentencing guidelines because such information is discoverable under Brady v.
18 Maryland, 373 U.S. 83 (1963). The United States respectfully contends that it has no such
19 disclosure obligation under Brady.

20 The United States is not obligated under Brady to furnish a defendant with information
21 which he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986). Brady
22 is a rule of disclosure, and therefore, there can be no violation of Brady if the evidence is already
23 known to the defendant. In such case, the United States has not suppressed the evidence and
24 consequently has no Brady obligation. See United States v. Gaggi, 811 F.2d 47, 59 (2d Cir. 1987).

25 But even assuming Defendant does not already possess the information about factors which
26 might affect his guideline range, the United States would not be required to provide information
27 bearing on Defendant’s mitigation of punishment until after Defendant’s conviction or plea of
28 guilty and prior to his sentencing date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th

1 Cir. 1988) (“No [Brady] violation occurs if the evidence is disclosed to the defendant at a time
2 when the disclosure remains in value.”). Accordingly, Defendant’s demand for this information
3 is premature.

4 **(5) Defendant’s Prior Record.**

5 The United States has already provided Defendant with a copy of her criminal record in
6 accordance with Federal Rule of Criminal Procedure 16(a)(1)(B).

7 **(6) Proposed 404(b) Evidence and 609 Evidence**

8 Should the United States seek to introduce any similar act evidence pursuant to Federal
9 Rules of Evidence 404(b) or 609, the United States will provide Defendant with notice of its
10 proposed use of such evidence and information about such bad act at the time the United States’
11 trial memorandum is filed.

12 **(7) Evidence Seized**

13 The United States has complied and will continue to comply with Rule 16(a)(1)(c) in
14 allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical
15 evidence which is within the possession, custody or control of the United States, and which is
16 material to the preparation of Defendant’s defense or are intended for use by the United States as
17 evidence in chief at trial, or were obtained from or belong to Defendant, including photographs.

18 The United States, however, need not produce rebuttal evidence in advance of trial. United
19 States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984), cert. denied, 474 U.S. 953 (1985).

20 **(8) Tangible Objects**

21 The Government has complied and will continue to comply with Rule 16(a)(1)(E) in
22 allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all
23 tangible objects seized that is within its possession, custody, or control, and that is either material
24 to the preparation of Defendant’s defense, or is intended for use by the Government as evidence
25 during its case-in-chief at trial, or was obtained from or belongs to Defendant. The Government
26 need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767
27 F.2d 574, 584 (9th Cir. 1984).

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1 **(9) Evidence of Bias or Motive to Lie**

2 The United States is unaware of any evidence indicating that a prospective witness is biased
3 or prejudiced against Defendant. The United States is also unaware of any evidence that
4 prospective witnesses have a motive to falsify or distort testimony.

5 **(10) Impeachment Evidence**

6 As stated previously, the United States will turn over evidence within its possession which
7 could be used to properly impeach a witness who has been called to testify. The United States
8 opposes Defendant's request to turn over the immigration files for the material witnesses. The
9 United States will review the files to determine if any evidence to which Defendant is entitled is
10 contained in the immigration files.

11 **(11) Criminal Investigation of Government Witness**

12 Defendants are not entitled to any evidence that a prospective witness is under criminal
13 investigation by federal, state, or local authorities. "[T]he criminal records of such [Government]
14 witnesses are not discoverable." United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976);
15 United States v. Riley, 657 F.2d 1377, 1389 (8th Cir. 1981) (holding that since criminal records
16 of prosecution witnesses are not discoverable under Rule 16, rap sheets are not either); cf. United
17 States v. Rinn, 586 F.2d 113, 118-19 (9th Cir. 1978) (noting in dicta that "[i]t has been said that
18 the Government has no discovery obligation under Fed. R. Crim. P. 16(a)(1)© to supply a
19 defendant with the criminal records of the Government's intended witnesses.") (citing Taylor, 542
20 F.2d at 1026).

21 The Government will, however, provide the conviction record, if any, which could be used
22 to impeach witnesses the Government intends to call in its case-in-chief. When disclosing such
23 information, disclosure need only extend to witnesses the United States intends to call in its case-
24 in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini,
25 607 F.2d 1305, 1309 (9th Cir. 1979).

26 **(12) Evidence Affecting Perception, Recollection, Communication or Truth-Telling**

27 The United States is unaware of any evidence indicating that a prospective witness has a
28 problem with perception, recollection, communication, or truth-telling.

1 **(13) Witness Addresses**

2 The Government has already provided Defendant with the reports containing the names of
 3 the agents involved in the apprehension and interviews of Defendant. A defendant in a non-capital
 4 case, however, has no right to discover the identity of prospective Government witnesses prior to
 5 trial. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); United States v. Dishner, 974 F.2d
 6 1502, 1522 (9th Cir 1992) (citing United States v. Steel, 759 F.2d 706, 709 (9th Cir. 1985)); United
 7 States v. Hicks, 103 F.23d 837, 841 (9th Cir. 1996). Nevertheless, in its trial memorandum, the
 8 Government will provide Defendant with a list of all witnesses whom it intends to call in its case-
 9 in-chief, although delivery of such a witness list is not required. See United States v. Discher, 960
 10 F.2d 870 (9th Cir. 1992); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). The
 11 Government is not aware of any “tips” provided by anonymous or identified persons that resulted
 12 in Defendant’s arrest.

13 The Government objects to Defendant’s request that the Government provide a list of every
 14 witness to the crimes charged who will not be called as a Government witness. “There is no
 15 statutory basis for granting such broad requests,” and a request for the names and addresses of
 16 witnesses who will not be called at trial “far exceed[s] the parameters of Rule 16(a)(1)©.” United
 17 States v. Hsin-Yung, 97 F. Supp.2d 24, 36 (D. D.C. 2000) (quoting United States v. Boffa, 513 F.
 18 Supp. 444, 502 (D. Del. 1980)). The Government is not required to produce all possible
 19 information and evidence regarding any speculative defense claimed by Defendant. Wood v.
 20 Bartholomew, 516 U.S. 1, 6-8 (1995) (per curiam) (holding that inadmissible materials that are not
 21 likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure
 22 under Brady).

23 **(14) Witnesses Favorable to the Defendant**

24 As stated earlier, the Government will continue to comply with its obligations under Brady
 25 and its progeny. Other than the material witness in this case, the Government is not aware of any
 26 witnesses who have made an “arguably favorable statement concerning the defendant or who could
 27 not identify him or who w[ere] unsure of his identity, or participation in the crime charged.”
 28

1 **(15) Statements Relevant to the Defense**

2 To reiterate, the United States will comply with all of its discovery obligations. However,
3 “the prosecution does not have a constitutional duty to disclose every bit of information that might
4 affect the jury’s decision; it need only disclose information favorable to the defense that meets the
5 appropriate standard of materiality.” Gardner, 611 F.2d at 774-775 (citation omitted). Further,
6 Defendant is not entitled to the Grand Jury transcripts.

7 **(16) Jencks Act Material**

8 The Jencks Act, 18 U.S.C. § 3500, requires that, after a Government witness has testified
9 on direct examination, the Government must give the Defendant any “statement” (as defined by
10 the Jencks Act) in the Government’s possession that was made by the witness relating to the
11 subject matter to which the witness testified. 18 U.S.C. § 3500(b). A “statement” under the Jencks
12 Act is (1) a written statement made by the witness and signed or otherwise adopted or approved
13 by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness’s
14 oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). If notes
15 are read back to a witness to see whether or not the government agent correctly understood what
16 the witness was saying, that act constitutes “adoption by the witness” for purposes of the Jencks
17 Act. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United
18 States, 425 U.S. 94, 98 (1976)). While the Government is only required to produce all Jencks Act
19 material after the witness testifies, the Government plans to provide most (if not all) Jencks Act
20 material well in advance of trial to avoid any needless delays.

21 **(17) Giglio Information**

22 As stated previously, the United States will comply with its obligations pursuant to Brady
23 v. Maryland, 373 U.S. 83 (1963), the Jencks Act, United States v. Henthorn, 931 F.2d 29 (9th Cir.
24 1991), and Giglio v. United States, 405 U.S. 150 (1972).

25 **(18) Agreements Between the Government and Witnesses**

26 The Government has not made or attempted to make any agreements with prospective
27 Government witnesses for any type of compensation for their cooperation or testimony.
28

1 **(19) Informants and Cooperating Witnesses**

2 The Government must generally disclose the identity of informants where (1) the informant
3 is a material witness, or (2) the informant's testimony is crucial to the defense. Roviaro v. United
4 States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court
5 may, in some circumstances, be required to conduct an in-chambers inspection to determine
6 whether disclosure of the informant's identity is required under Roviaro. See United States v.
7 Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the Government determines that there
8 is a confidential informant who is a material witness in this case, the Government will either
9 disclose the identity of the informant or submit the informant's identity to the Court for an in-
10 chambers inspection.

11 **(20) Bias by Informants or Cooperating Witnesses**

12 As stated above, the United States is unaware of any evidence indicating that a prospective
13 witness is biased or prejudiced against Defendant. The United States is also unaware of any
14 evidence that prospective witnesses have a motive to falsify or distort testimony.

15 **(21) Law Enforcement Personnel Files**

16 The United States will continue to comply with its obligations pursuant to United States
17 v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

18 **(22) TECS Reports**

19 Defendant is not entitled to TECS reports unless the Government seeks to introduce the
20 TECS reports as 404(b) evidence. Prior border crossings do not fall within the scope of 404(b)
21 unless offered for a purpose consistent with 404(b). Defendant's interpretation of Vega is simply
22 wrong. Vega merely holds that, to qualify under Rule 404(b), an act need not be intrinsically
23 "bad." United States v. Vega, 188 F.3d 1150 (9th Cir. 1999). Vega does not purport to overrule
24 all the prior Ninth Circuit (and other courts of appeals) authority that universally holds that, for
25 Rule 404(b) to apply, the "act" must relate to the defendant's character. If in fact Vega purports
26 to overrule prior precedent, it is not good law and should not be followed. The Vega panel did not
27
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1 have the authority to overrule prior Ninth Circuit cases. See e.g., Hart v. Massanari, 266 F.3d
 2 1155, 1171 (9th Cir. 2001).

3 **(23) Expert Summaries**

4 The Government will comply with Rule 16(a)(1)(G) and provide Defendant with a written
 5 summary of any expert testimony that the Government intends to use under Rules 702, 703, or 705
 6 of the Federal Rules of Evidence during its case-in-chief at trial. This summary shall include the
 7 expert witnesses' qualifications, the expert witnesses opinions, the bases, and reasons for those
 8 opinions.

9 **(24) Law Enforcement Training Records, Performance Goals and Policy Awards**

10 Defendant makes a blanket request for all law enforcement training manuals, instructions
 11 and information regarding policy goals and awards relating to the detection of contraband.
 12 Defendant provides no authority for this request, nor does Defendant articulate any basis for the
 13 discovery of this information. The Government opposes this request.

14 **(25) A-File Review of Material Witness**

15 Defendant is not entitled to view the A-File of the material witness. The Government will
 16 review the material witness's A-File and provide to Defendant any information they are entitled
 17 to receive.

18 **(26) Residual Request**

19 The Government has already complied with Defendant's request for prompt compliance
 20 with its discovery obligations. The Government will comply with all of its discovery obligations,
 21 but objects to the broad and unspecified nature of Defendant's residual discovery request.

22 **(27) Grand Jury Transcripts**

23 Defendant has not demonstrated a particularized need for the Grand Jury transcripts. The
 24 Government will provided Defendant with any prior statements of witnesses that it intends to call
 25 at trial.

26 //

27 //

1 **(28). Preservation of Evidence**

2 The United States will preserve all evidence to which Defendant is entitled pursuant to the
3 relevant discovery rules. However, the United States objects to Defendant's blanket request to
4 preserve all physical evidence.

5 The United States has complied and will continue to comply with Rule 16(a)(1)(C) in
6 allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical
7 evidence which is within his possession, custody or control of the United States, and which is
8 material to the preparation of Defendant's defense or are intended for use by the United States as
9 evidence in chief at trial, or were obtained from or belong to Defendant, including photographs.
10 The United States has made the evidence available to Defendant and Defendant's investigators and
11 will comply with any request for inspection.

12 Again, the United States will continue to comply with its obligations pursuant to
13 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

14 **B. THE GRAND JURY INSTRUCTIONS WERE NOT FAULTY, AND THE**
15 **INDICTMENT SHOULD NOT BE DISMISSED**

16 It bears noting that the Hon. John A. Houston and the Hon. Barry Ted Moskowitz, both
17 recently issued a detailed Order analyzing and rejecting all of the arguments Defendant raises here.
18 See Order of Judge Moskowitz, attached as Appendix 3 and Order of Judge Houston attached as
19 Appendix 4. The United States adopts the reasoning in this Court's previous order and requests
20 that the Court reach the same result. Attached as Appendix 1 is the "Partial Transcript" of the
21 Grand Jury Proceedings. Attached as Appendix 2 is a redacted "Supplemental Transcript" which
22 records the relevant portions of the voir dire proceedings.

23 This Court, and other courts of this district, have repeatedly rejected the arguments raised
24 by Defendant before, and we ask the Court to do so again.

25 **C. LEAVE TO FILE FURTHER MOTIONS**

26 The Government does not oppose this motion, as long as future motions are based upon
27 evidence or information not now available.

28 //

VI

CONCLUSION

For the foregoing reasons, the United States requests that the Court deny Defendant's motions, except where unopposed.

DATED: March 18, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ A. Dale Blankenship
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 08CR0369-JLS
)
Plaintiff,)
) **CERTIFICATE OF SERVICE**
v.)
)
CHEONG SAU WONG(1),)
XU JUN LEE(2),)
)
Defendant.)

IT IS HEREBY CERTIFIED THAT:

I, A. DALE BLANKENSHIP, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO:**

- 1. COMPEL DISCOVERY;**
- 2. DISMISS INDICTMENT; AND**
- 3. FILE FURTHER MOTIONS.**

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Leila Morgan, Esq., Federal Defenders of San Diego
Leila_Morgan@fd.org
Steven E. Feldman, Esq., Law Offices of Steven E. Feldman,
sfeldman77@san.rr.com

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 18, 2008.

s/ A. Dale Blankenship
A. DALE BLANKENSHIP